

No. 2781

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

In the Matter of the Petition of the EQUITABLE
TRUST COMPANY of New York, as Trustee, for
a Writ of *Mandamus*, to be Issued and Directed
to the Honorable WILLIAM C. VAN FLEET,
Judge of the United States District Court, for
the Northern District of California, Second
Division.

SUPPLEMENT TO BRIEF FOR RESPONDENT.

GARRET W. McENERNEY,
JOHN S. PARTRIDGE,
Counsel for Respondent.

Filed this.....day of May, 1916.

F. D. Monckton
FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition of the EQUITABLE TRUST COMPANY of New York, as Trustee, for a Writ of *Mandamus*, to be Issued and Directed to the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, for the Northern District of California, Second Division.

SUPPLEMENT TO BRIEF FOR RESPONDENT.

We have just been served (May 9, 1916) with a "Brief in Reply" signed by counsel for petitioner and counsel for the reorganization committee, the latter appearing as *amici curiae*.

No provision was made for the filing of briefs after submission, and we had supposed that no briefs would be filed.

Inasmuch as we have been served with this brief, we have assumed it is proper for us to serve and file this supplement, that we may deal shortly with matters of dispute between counsel and ourselves.

1. We do not rely upon the decisions in Kansas or California for the construction of Section 21 of the Judicial Code. We claim that its construction has been definitively settled by the Supreme Court in *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35, and that nothing further need be said upon the point. We wish, however, to emphasize a sentence in that opinion, as follows (230 U. S. 45):

“We shall not pass upon the timeliness of the affidavit, *nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment* that ‘personal bias or prejudice’ existed.”

We understand this sentence to mean that every affidavit presents for determination the question of “the legal sufficiency of the facts therein stated, as affording ground for the averment that ‘personal bias or prejudice’ existed”, and that the Supreme Court did not pass upon that question because it had been passed upon judicially by the judge to whom it was addressed (Judge Chatfield), and the matter was to be reviewed, if at all, on appeal from the decisions of Judge Mayer sitting in the place of Judge Chatfield.

In other words, one of the grounds upon which mandamus was refused in *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35, was that the matter had been passed upon judicially by Judge Chatfield and that he had decided that the affidavit was sufficient and timely. The Supreme Court decided not only that he had jurisdiction to determine that the affidavit was sufficient and timely, but it went farther and said, in terms (which would necessarily follow if it had not been said), that

as he had jurisdiction to decide that it was sufficient and timely he had also jurisdiction to decide that it was neither sufficient nor timely.

2. If, however, the question were open, we would rely upon the Federal cases cited with approval and followed by the Supreme Court in *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35.

In speaking of *Henry v. Speer* (C. C. A., 5th C., 1913), 201 Fed. 869 (Br. Res., pp. 28-29), we said that "the court held that the affidavit was insufficient because it did not state that Judge Speer had 'a *personal* bias or prejudice' ". This same statement is made in petitioner's Brief in Reply (p. 4).

The decision in *Henry v. Speer* went much farther, however, because it held that "the facts and reasons advanced" dealt rather with "a prejudgment of the merits of the controversy", adding: "Section 21 is not intended to afford relief against this situation."

In other words, we understand this case to decide that, if "the facts and reasons advanced" show "a prejudgment of the merits of the controversy" rather than a personal bias or prejudice against the litigant, the affidavit is insufficient, and the judge sought to be disqualified, in determining its "legal sufficiency", can so hold.

Counsel are mistaken in the statement that the affidavit in *Ex parte Fairbank Co.* (1912), 194 Fed. 978, did not contain any statement "of the facts and the reasons for the belief." The affidavit said that the correspondence was the fact and the reason for the

belief, but Judge Jones held that that fact and reason were insufficient to support the averment of a personal bias or prejudice (Br. Res., pp. 25-27).

In *Ex parte Glasgow* (D. Ct., N. D. Ga., 1912), 195 Fed. 780, the court held that if a judge decided that the affidavit was insufficient, and proceeded with the case, his action was not void, thereby implying that the determination was judicial and, as expressly stated, reviewable upon appeal.

3. In addition to the Federal cases referred to, we claim that the decisions in Kentucky and Idaho may be appropriately drawn upon, because in those states, the statute, like Section 21 of the Judicial Code, requires that the disqualifying affidavit give facts and reasons, and it is the law in those states that the sufficiency of the affidavit will be determined by the sufficiency of the facts, and the sufficiency of those facts is for the determination of the judge sought to be disqualified, whose judgment against their sufficiency will, if occasion arise, be reviewed upon appeal.

See *Landram v. German Ins. Co.* (1889), 88 Ky. 433; 11 S. W. 367, and cases from Kentucky and Idaho cited in Br. Res., pp. 37-38.

In addition to the cases from these two states, we rely upon *Hays v. Morgan* (1882), 87 Ind. 231 (Br. Res., pp. 38-39). Although the statute in Indiana does not require the facts to be set out, in the case just mentioned *the facts were set out* and the judge sought to be disqualified decided that the affidavit was to be determined by the sufficiency of the facts stated

(although the affidavit would have been sufficient without a statement of the facts), and in so holding he was affirmed upon appeal.

In this connection, we attach importance to the fact that the words "*facts and*" were introduced into Section 21 of the Judicial Code as the result of the report of a conference committee representing both Houses of Congress, March 2, 1911 (see Appendix), and that of the six members of the committee one came from Kentucky (Representative Sherley) and another from Idaho (Senator Heyburn), and that the type of disqualifying affidavit here involved does not exist in any of the other states represented on the Conference Committee (Pennsylvania, New York, Utah, and Arkansas).

4. In his oral argument Mr. Bowie made the point that the Congressional debates were not mentioned in the brief of respondent, as affording the basis for an argument that they were deemed by us to be unfavorable to the interpretation of the statute upon which we rely.

In preparing for the argument we carefully examined the Congressional debates and believed that they sustained the interpretation put upon Section 21 of the Judicial Code by the Supreme Court in *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35, and the cases from the Federal Reporter already dealt with, but we did not refer to the legislative history of the section in view of the decisions which attach little or no weight to Congressional debates (*U. S. v. Trans-Missouri Assn.* (1896), 166 U. S. 290, 318; *Lapina v. Williams* (1914), 232 U. S. 78).

We also drew upon the California cases and cases from other states to show that it is the common and ordinary practice for proceedings to disqualify a judge to be heard and determined by the judge so sought to be disqualified, and that the usual remedy for error in such cases is the ordinary one of appeal.

Inasmuch, however, as the petitioner attaches much weight to the debates themselves, we add as an appendix the analysis of those debates which we made in preparation for the argument of this matter.

5. In petitioner's Brief in Reply (p. 1), counsel speak of the California decisions "so heavily relied upon", as though we drew upon them for the construction of Section 21 of the Judicial Code.

What we drew upon the California cases for was to show that a judge sitting to hear the question of his own disqualification is acting judicially.

We also cited those cases to show that applications to disqualify judges are often denied upon an uncontradicted showing as in *Estate of Dolbeer* (1908), 153 Cal. 652, 656.

6. We pointed out on the oral argument that, in view of the reference in Section 21 of the Judicial Code to Section 23 of the same code, a judge might decide a disqualifying affidavit to be sufficient and timely and call in his colleague in a district where there are more district judges than one, and, therefore, that it is not true that the senior circuit judge is called upon to pass upon the sufficiency and timeliness of the affidavit. To this point the petitioner has made no reply.

7. If Judge Van Fleet had made the order asked by the petitioner (Br. Res., pp. 19, 20) he would thereby have found (a) that the affidavit was sufficient, and (b) that it was in time. It is true that the petitioner did not ask him to make such a finding in terms in the order, but that would have been the necessary legal implication arising from the making of the order.

8. It is hardly arguable that it was the intention of Section 21 of the Judicial Code to require the litigants to attend before the senior circuit judge in whatever part of the circuit he may be, to argue the sufficiency and timeliness, or insufficiency and untimeliness, of a disqualifying affidavit. This is another circumstance to show that it never was intended that he should decide the matter.

9. The petitioner gives a far-fetched interpretation of *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35, when it endeavors either to argue or to suggest that that case is authority for the proposition that the senior circuit judge must pass upon the sufficiency of the affidavit.

All that the case decides is that when the senior circuit judge receives an affidavit of personal bias and prejudice upon which the judge sought to be disqualified has acted, and which either expressly or by necessary legal effect, he has adjudged to be both sufficient and timely, the senior circuit judge is then called upon in the disposition of the judicial business of his circuit to assign another district judge to sit in the proceeding in which the disqualifying affidavit was filed.

The point with which the Supreme Court was dealing, when it used this language, had nothing to do with the question of determining the sufficiency or timeliness of the affidavit.

10. In Petitioner's Brief in Reply (pp. 15-16), the attempt to deal with Judge Van Fleet's order holding that no case for his disqualification had been made out, as though its scope could be limited by his reasons, fails because the order is not predicated upon limited reasons but rests upon the ground that the affidavit was neither sufficient nor timely. The fact that Judge Van Fleet said that he did not care whether or not the petitioner was technically a party to the controversy is nothing to the point. Furthermore, orders do not depend for their effectiveness upon the reasons assigned for their entry.

Latting v. Owasso Mfg. Co. (C. C. A., 8th Cir., 1906), 148 Fed. 369;

Josslyn v. Cadillac Automobile Co. (C. C. A., 6th Cir., 1910), 177 Fed. 863;

McCloskey v. Pacific Coast Co. (C. C. A., 9th Cir., 1908), 160 Fed. 794;

Eureka County Bank v. Clarke (C. C. A., 9th Cir., 1904), 130 Fed. 325;

Dean v. Davis (C. C. A., 4th Cir., 1914), 212 Fed. 88;

Fourth National Bank of Macon v. Willingham (C. C. A., 5th Cir., 1914), 213 Fed. 219;

Von Baumbach v. Sargent Land Co. (C. C. A., 8th Cir., 1914), 219 Fed. 31;

Mason v. United States (C. C. A., 8th Cir., 1915), 219 Fed. 547.

11. It seems to be conceded (Petitioner's Brief in Reply, p. 17) that the trustee, as trustee, has no *real* interest in the question of an upset price. That question is one between the reorganization committee as intending purchaser, on the one hand, and the minority bondholders, on the other.

The reorganization committee is not appearing here as such, and the trustee, as trustee, will not be permitted to maintain a proceeding in mandate the object of which is to achieve the purposes of the majority bondholders in a controversy which they have with the minority bondholders and in respect of which, as matter of law, the trustee would be treated as neutral if it had not become allied with the majority bondholders.

12. In this case the trustee, as trustee, seeks Judge Van Fleet's disqualification in order that he may not fix an upset price. The proceeding is prosecuted at the request of the majority bondholders and the petitioner is here supported by the counsel for the majority bondholders.

The trustee, as trustee, will not be permitted to prosecute an application which is really the application of the majority bondholders, even though the trustee has become an integral part of the reorganization committee and has *de facto* an interest in the case in hostility to and in conflict with the interests of the minority.

In other words, the petitioner, as trustee, is a party to this action because it holds a position fiduciary to all the bondholders. Since the litigation commenced, it has become allied with one group of the persons to whom it bears a fiduciary relation, and that group has

interests in conflict with the interests of the remaining group, in respect of the upset price.

We shall assume for present purposes that the trustee was at liberty openly to ally itself with the group of which it is an integral part. We insist however, that having done so, it will not be permitted to use the standing which it has as a party to the action, *representative of all the bondholders*, to accomplish the purposes of some of the bondholders with whom it has become allied, and who in their ultimate object (a low or no upset price) have interests in conflict with those of the other group of minority and non-depositing bondholders.

13. We think that the question of when mandamus will lie and when it will not lie is foreclosed of debate by *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35; *Ex parte Roe* (1914), 234 U. S. 70, and *Ex parte Harding* (1911), 219 U. S. 363.

It may be helpful, however, for us to point out (a) the jurisdiction in general of the Supreme Court to issue writs of mandamus, and (b) the jurisdiction of circuit courts of appeal, from which it appears that the ampler power of the Supreme Court is not extended to the circuit courts of appeal.

The jurisdiction of the Supreme Court in mandamus is two-fold:

(a) When necessary for the exercise of its appellate jurisdiction (Sec. 262, Judicial Code, copied from Sec. 716, Rev. Stats., in turn copied from Sec. 14, chap. 20, Judiciary Act 1789); and

(b) "In cases warranted by the principles and usages of law to any courts appointed under the authority of the United States" (Sec. 234 of the Judicial Code, copied from Sec. 688, Rev. Stats., and in turn taken from Sec. 13, chap. 20, Judiciary Act.)

The powers of circuit courts of appeal in mandamus are those only which are mentioned in Section 262 of the Judicial Code, and do not extend to those which are enjoyed by the Supreme Court under Section 234 of the Judicial Code.

Section 12 of the act creating a circuit court of appeals gives this court, in respect of mandamus, "the power specified in Section 716 of the Revised Statutes of the United States" (26 Stats. at L., 829) and does not give it the powers specified in Section 688 of the Revised Statutes and now carried into Section 234 of the Judicial Code.

If they were otherwise applicable (which they are not) the cases of *Ex parte Virginia* (1880), 100 U. S. 313, and *In re Winn* (1908), 213 U. S. 458, would not be in point here, for they were decided under the power given to the Supreme Court in Section 688 of the Revised Statutes—a power which the circuit court of appeals does not possess.

Respectfully submitted,

GARRET W. McENERNEY,

JOHN S. PARTRIDGE,

Counsel for Respondent.

San Francisco, May 10, 1916.

APPENDIX.

THE LEGISLATIVE HISTORY OF SECTION 21 OF THE JUDICIAL CODE, AS IT IS FOUND IN THE CONGRESSIONAL RECORD.

The legislative history of Section 21 of the Judicial Code may be found in the proceedings of the House of Representatives for the three days following:

- (a) December 14, 1910, (see Congressional Record, Vol. 46, Part I, pages 1-1038, 61st Congress, 3d Session, Dec. 5, 1910—Jan. 17, 1911).
- (b) February 15, 1911, (see Congressional Record, Vol. 46, Part 3, pages 2037-3034, 61st Congress, 3d Session, Feb. 7—Feb. 20, 1911).
- (c) March 2, 1911, (Congressional Record, Vol. 46, Part 4, pages 3035-4022, 61st Congress, 3d Session, Feb. 21—March 2, 1911).

We shall briefly state what these proceedings were and point out the significance and importance of some of them as we go along.

HOUSE OF REPRESENTATIVES, DECEMBER 14, 1910.

The subject matter of the present Section 21 of the Judicial Code was first brought to the attention of Congress in the House December 14, 1910 (p. 305, column two, near bottom) by Mr. Cullop of Indiana, and a discussion took place which resulted in unanimous consent to his proposing an amendment to Section 20 on the subject of disqualifying a judge (p. 306, column two, middle).

It is very clear from Mr. Cullop's statements that he wished to offer an amendment which would forthwith and automatically remove a judge.

Mr. Sherley of Kentucky said (p. 306, column two, second half):

“Mr. Speaker, the gentleman from Indiana has raised a very important and, to my mind, *a very difficult question*.^{*} One of the first bills that I ever introduced as a Member of Congress was a bill giving to litigants the right to swear off a judge *where proper allegations*,[†] supported by affidavits, were made as to the judge’s unfairness. That bill was the result of a direct experience of my own. That evil exists to-day, and is only equaled by one other evil in the Federal practice. There is not to-day any method whereby a litigant may have the record show the actual proceedings of the trial court, if the Federal trial judge wants to deny him that right. You may mandamus a Federal judge to sign a bill of exceptions, but you can not obtain a writ of mandamus to compel him to sign a particular bill, and there is no way by which you can make the records show any fact that he is not willing to permit to go into the bill of exceptions.”

The House then proceeded to other business, but later in the day (p. 320, column two, near bottom) the following occurred:

“Mr. CULLOP. Mr. Speaker, when we were considering section 20 permission was granted me to offer an amendment to be taken up at some time when the bill was under consideration in the House. I have prepared the amendment, and I ask to have it made a part of the record so that Members can see what it is before being asked to vote upon it.

*It is to be noted that Mr. Sherley is from Kentucky where a disqualifying affidavit must contain the facts relied upon for the disqualification of the judge. (See *German Ins. Co. v. Landram* [1889] 88 Ky. 433; 11 S. W. 367, and cases from Kentucky in Brief on Behalf of Respondents, page 37.)

†It is to be observed that Mr. Sherley had in mind an affidavit containing “proper allegations”, which we understand to mean facts tending to show bias and prejudice.

The SPEAKER. The gentleman from Indiana asks unanimous consent that the following amendment, which he offers, may be printed in the Record. Is there objection?

There was no objection.

The amendment is as follows:

That section 20 be amended by adding thereto the following:

‘That a change of venue from any judge shall be granted to either party to any action when the party asking said change shall make and file an affidavit stating—

‘First. The presiding judge of the court is a material witness for the party making the application.

‘Second. When either party to an action pending before any district court shall make and file an affidavit of the bias, prejudice, or interest of the judge before whom the said cause is pending.

‘Upon the filing of such affidavit in either case the presiding judge shall proceed no further in said cause, but another judge shall be appointed to hear and determine said cause.’ ”*

HOUSE OF REPRESENTATIVES, FEBRUARY 15, 1911.

The House had under consideration “the bill H. R. 23377, known as the codification bill” (p. 2606, foot column 1).

At p. 2626, Mr. Cullop of Indiana asked to withdraw an amendment to Section 20 which he had submitted on

* Mr. Cullop’s proposed amendment to Section 20 of the Judicial Code was of course taken from the statute of Indiana (Burns Ann. Ind. Stats. 1914, Vol. 1, p. 297), which reads as follows:

“The Court in term, or the judge thereof in vacation, shall change the venue of any civil action upon the application of either party, made upon affidavit showing one or more of the following causes:

First. That the judge has been engaged as counsel in the cause prior to his election or appointment as judge, or is otherwise interested in the cause.

Second. That the judge is kin to either party.

Third. That the opposite party has an undue influence over the citizens of the county, etc.

* * * * *

Seventh. When either party shall make and file an affidavit of the bias, prejudice, or interest of the judge before whom the said cause is pending.”

December 14th, 1910. This was agreed to, and he thereupon offered as an amendment to the codification bill a new section to be known as Section 20a. This section is the basis of Section 21, as it now exists, and it received its number 21 on March 2, 1911, as will hereinafter appear.

Section 20a thus proposed read as follows:

“Sec. 20a. Whenever a party to any action or proceeding, civil or criminal, shall file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section 23, to hear such matter. Every such affidavit shall set forth reasons for the belief that such bias or prejudice exists, and shall be filed not less than 10 days before the time set for the trial or hearing of the case, or good cause be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit.”

Section 21 as adopted reads as follows:

“Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than

one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

Let us now account for the changes:

(a) The section as proposed said "shall file an affidavit"; the section as passed reads "shall *make and* file an affidavit."

The reason for this change was suggested by Mr. Mann (p. 2627, top column two; also p. 2628, first half column one), who said that in Illinois it was a common practice to pick up men on the street to make an affidavit. The amendment was designed to require the affidavit to be the affidavit of the litigant.

(b) It is to be observed that the section as proposed by Mr. Cullop provided that "such affidavit shall set forth reasons for the belief", whereas the section as passed provides that the affidavit "shall *state the facts and* the reasons for the belief."

In connection with the clause as proposed by Mr. Cullop, he was asked if the provision that "such affidavit shall set forth reasons for the belief" left it to the judge to determine whether those reasons were sufficient. To this he replied (p. 2627, top column one):

"MR. CULLOP. No; it expressly provides that the judge shall proceed no further. If this affidavit is to be reviewed, it would be by the judge who is called in to suc-

ceed him.* *It does not say that he shall state the facts,† but the reasons for the belief that he has that the judge is biased or prejudiced in the case."*

A colloquy occurred in respect of the reason and meaning of the provision requiring reasons to be given. This was as follows (p. 2629, column one):

"Mr. MANN. What is the purpose that the gentleman has in mind, in requiring that the affidavit shall state the reason?

Mr. CULLOP. The reason for the belief that he entertains?

Mr. MANN. What is the reason for putting that in, I mean?

Mr. CULLOP. *I have done that at the suggestion of the committee. It was not my own purpose to do that.‡*

Mr. MANN. That is what I wanted to get at.

Mr. CULLOP. It was the suggestion of the committee, that it might correct any abuses that might grow up under this provision.

Mr. MANN. It has been suggested here by Members that, under this amendment offered by the gentleman, the judge would have a discretion in passing upon the matter, and he would have the right to examine and ascertain whether the reasons were sufficient. Now, that

*It is evident that Mr. Cullop was in error in making the suggestion that the sufficiency of the disqualifying affidavit would be passed upon by the judge who was called in to succeed the disqualified judge. The fact that a judge steps aside in order that another judge may take jurisdiction of the case involves the conception that it has been determined either by the law or by the judge sought to be disqualified that the proceedings are sufficient.

†Mr. Cullop here gives evidence of his belief that if the affidavit were required to state the facts, then the question of the sufficiency of those facts would have to be passed upon. Later, as we shall show, Congress required the affidavit to set up the facts, and this circumstance would seem to upset Mr. Cullop's views just expressed.

‡In other words, the provision in Section 21 of the Judicial Code that the reasons should be stated was a requirement of the Committee, whose ideas in respect of the legislation might have been different from the ideas of Mr. Cullop. In Mr. Cullop's state (Indiana) the reasons were not required to be given, but it has been decided even in that state that if the reasons are given, the sufficiency of the affidavit is to be tested by the sufficiency of the reasons given. (Hays v. Morgan [1882] 87 Ind. 231.)

is plainly not the purpose of the gentleman from Indiana. Is there any reason why it should be left in uncertainty?

Mr. BENNET of New York. Not at all.

Mr. MANN. When you undertake to say that a man shall file an affidavit of prejudice, and give the reason for his prejudice, is there not some question as to whether that does not permit the judge to pass upon the reasons? Otherwise, what is the object of giving the reason?

Mr. CULLOP. No; because the very provision of the statute is that he shall proceed no further."

This is all the discussion that there was in the House about the meaning of the clause in respect of the facts and reasons for the belief.

(c) It will be noted that it was provided that the affidavit should be filed "not less than 10 days before the time set for the trial or hearing of the case."

This provision gave rise to a good deal of debate (pp. 2628-2630) and finally resulted in the provision that it "shall be filed not less than 10 days before the beginning of the term of the court" (p. 2630, column one).

(d) The last sentence of Section 21 as it now exists was added in the House February 15, 1911 (p. 2630, column one).

This last sentence reads as follows:

"The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

(e) "Good cause shown" was considered in the debates of February 15, 1911.

"Mr. BENNET of New York. That is true, but who is to construe the language 'for good cause shown'? Suppose the judge says it is not a good cause.

Mr. CULLOP. That judge can not pass upon that question. *What judge could say that it was not good cause when a man said he did not know of the existence of the cause before the time he filed his affidavit?**

Mr. BENNET of New York. Why put the language in at all? Whenever you put language in like that it is open to construction. You make it discretionary, and discretionary to whom? To the very judge whom you want to take off the bench."

[P. 2628, foot of column two.]

This question was not settled, however, because Mr. Cullop went on to instance a case where the affidavit showed "that the reason for the change was unknown to him before the time that he files it."

Mr. Bennet's question, therefore, continues to be pertinent.

(f) During the debate in the House, the words "or his counsel" were added to the section so that, as reported, it read "Whenever a party, or his counsel, to any action or proceeding", etc. (p. 2628, column one, foot). This was afterwards stricken out at the instance of the Senate conferees, as will hereinafter appear (p. 3998, column one, second half).

(g) At the close of the consideration of Section 20a on February 15th, 1911, we find that that section as agreed to in the Committee of the Whole in the House (p. 2628, column one, foot) was identical with the Section as offered by Mr. Cullop (p. 2626, column two, second half), except in two particulars: The words "or his

*It did not occur to Mr. Cullop that the question of good cause would ever arise except in a case in which a man said he did not know of the existence of the cause until he filed his affidavit, and therefore Mr. Cullop made no adequate explanation of the office and function of the provision that the affidavit must be filed in time or good cause shown why it was not filed.

counsel” were inserted, and the words “make and” were added, thus authorizing the affidavit to be made by “a party, or his counsel”, and also making the clause read “shall *make and* file an affidavit.”

(h) The requirement of a certificate of counsel was first inserted by the Senate (see proceedings of the House, p. 4001, column two, second half, hereafter quoted), and then agreed to by the House as a part of the amendments proposed by the Senate conferees (see proceedings of the House, p. 3998, column one, second half).

(i) The provision requiring the affidavit to contain the facts was proposed by the Senate conferees and agreed to in the House March 2, 1911 (p. 3998, column one, second half, hereafter quoted).

HOUSE OF REPRESENTATIVES, MARCH 2, 1911.

In the House March 2, 1911, the following proceedings occurred:

“CODIFICATION OF THE LAWS RELATING TO THE JUDICIARY.”

Mr. MOON of Pennsylvania. Mr. Speaker. I submit a conference report on the bill (S. 7031) to codify, revise, and amend the laws relating to the judiciary, and I ask unanimous consent that the statement may be read in lieu of the report.

The SPEAKER. Is there objection?

There was no objection.

Mr. PARKER. I reserve points of order on the report.

Mr. SPEAKER. The Clerk will read the statement.

The conference report and statement are as follows:

CONFERENCE REPORT.

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the

bill S. 7031, being a bill to codify, revise, and amend the laws relating to the judiciary, having met, after full and free conference, have agreed to recommend, and do recommend, to their respective Houses as follows:

That the Senate agree to the House amendment, with amendments to sections * * * 21 * * *.

That the House agree to the amendments proposed by the Senate conferees, as follows:

(The references to section numbers and pages are to the bill as reported by the conferees and not to the bill as it passed the House or Senate.)

* * * * *

Section 21. On page 10, in line 13, strike out the words 'or his counsel.' In line 22, before the word 'reason,' insert the words 'facts and the.' In line 22, after the word 'cause,' insert the word 'shall.' On page 11, line 2, after the word 'affidavit,' insert the words 'and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.'

[P. 3998, column one, second half.]

* * * * *

R. O. MOON [Pa.,
HERBERT PARSONS [N. Y.,
SWAGAR SHERLEY [Ky.,
Managers on the part of the House.
W. B. HEYBURN [Idaho],
GEO. SUTHERLAND [Utah],
JAMES P. CLARKE [Ark.,
*Managers on the part of the Senate.**

STATEMENT.

An exactly similar bill was introduced both in the Senate and House, the Senate bill being S. 7031 and the House bill H. R. 23377. After the House had considered

*It will be noted that Mr. Sherley of Kentucky was one of the Conference Committee, and that Senator Heyburn of Idaho was another. In these two states disqualifying affidavits are required to state the facts. In the other four states represented in the Conference Committee (Pennsylvania, New York, Utah and Arkansas), there is no legislation of the type here involved.

the bill for a number of days the Senate bill was passed and was sent to the House; whereupon the House took up the Senate bill, struck out all after the enacting clause, and substituted therefor the House bill.

In this statement the sections are the sections of the bill as reported by the conferees. The figures in brackets refer to the sections of the bill at it passed the House.

The Senate, in its consideration of the bill, adopted a number of amendments. Many of these amendments were of a mere formal character, to wit:

* * * * * *

To all of these formal amendments the conferees on the part of the House assented.

The other amendments made by the Senate embracing substantive changes were as follows:

* * * * * *

In all of the other amendments made by the House the Senate concurred, with amendments as follows:

Section 21 [20A]. The challenging of a judge on account of personal bias or prejudice. An amendment was made which required the counsel of record to certify that in his judgment the affidavit so filed was made in good faith."

[P. 4001, columns one and two.]

The report of the conferees was adopted. (See p. 4012, column two, top.)